

May 21, 2013
House Committee on Oversight
RE: House Bills 4001 & 4314

Good afternoon Mr. Chairman and members of the committee.

My name is Robin Luce-Herrmann and I serve as General Counsel for the Michigan Press Association (which represents over 300 newspapers and websites that reach an audience of 6.9 million Michigan residents).

As this Committee knows from my prior testimony, one of the services our firm provides is a "hotline" for FOIA questions across the state. Because of our expertise in this area of the law, I also receive calls from ordinary citizens, as well candidates for public office.

I can tell you based on personal experience that public officials and public employees continue to construct barriers to access to public records.

I would like to share several more of those experiences with you.

Hamtramck

On March 15, a reporter sought through FOIA, 2 booking photos from the Hamtramck police department. As this Committee knows,

FOIA provides that a "writing" includes "photographing" and "photographic films or prints" and "other means of recording or retaining meaningful content". MCL 15.232(h).

The City's attorneys responded to the FOIA request, saying the request was "granted" – what they produced was the "arrest summary" which contained 2 photographs as part of the document – and the photos were in black and white.

The reporter followed up, asking if it was possible to obtain a copy of the image, and was told "sorry, no".

I should note here, that it appears that at least 1 other news organization was previously able to obtain copies of photos themselves, and use them in a story.

So I got involved, and wrote an appeal – pointing out that the reporter specifically requested the photos and that FOIA expressly included photos.

I sent the appeal on April 12. I heard nothing, so I sent a follow up email on April 22 and was told that “I mailed the photos today.”

I received what was mailed on April 23 – the letter again said that the request was “granted”. What did we receive? COLOR copies of the arrest summary with the embedded pictures – the photos themselves were not provided.

You should note that at no time was the response “we do not have the photographs”.

So what were my client’s options? He could sue – that is all.

Kentwood Police Dept.

In another instance involving police records, the FOIA request was denied in its entirety on the basis that the 2 cases were “open/active investigations and not available for release at this time.”

No attempt was made to separate any exempt material from the non-exempt as required by FOIA.

Nor did that public body cite any applicable exemption - there is no exemption for “open/active investigations”

And, if this was an attempt to invoke the law enforcement investigations exemption, there was no effort to engage in any of the weighing of the interests required under that exemption.

Kent County Sheriff’s Dept.

A county sheriff’s cruiser crashed about 3:30 am on a Sunday. A FOIA request sought the dashcam video and police reports – the request was denied, including on the basis that:

1. It was an unwarranted invasion of privacy, because, among other things, “other deputies were assisting...during this medical emergency”.
2. It would reveal “the identity of the emergency medical action administered and protocol followed” and
3. It would reveal the “emergency medical personnel of AMR who are private individuals assisting th[e] deputy during the medical emergency”.

The assertion that law enforcement officers and emergency medical personnel have a privacy interest in how they perform their taxpayer-funded jobs flies in the face of both the spirit and the letter of FOIA.

Kalamazoo Public Schools

In response to a FOIA request seeking 12 specific categories of information, a school system responded, among other things, stating that the cost would be \$5,000, including labor costs – despite the fact that the school admittedly has never established and published procedures and guidelines governing assessment of such costs. MCL 15.234(3) (“...A public body *shall* establish and publish procedures and guidelines to implement this section.”); *Bloch v Davison Community Schools*, unpublished opinion per curiam of the Court of Appeals issued Apr 26, 2011 (Docket No. 296003).

I sent a very detailed appeal letter, pointing out the requirements for the charging of fees and raising some issues we had with the fees they outlined.

We also raised issues with the claimed exemptions – which were stated very broadly, and were not specific to any particular documents or categories of documents.

The response? As written, it was essentially -

The Board voted to deny the appeal.

What was this public body really saying? Go pound sand – sue us and they are betting that the news organization lacks the money to pay the \$5,000 or to sue.

Misc.

Public bodies have denied FOIA requests on the basis that the document requested is not “retained as part of the ordinary course of business” or because they were not created by the public body. They do this despite the fact that a

(e) “Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function

Unfortunately, these are just a few examples. On a weekly basis, I deal with citizens and reporters who are unable to get basic information about the functioning of their government.

I would like to paraphrase from a decision by Judge Damon Keith of the 6th Circuit Court of appeals (*Free Press v. Ashcroft*, 303 F3d 681 (2002)).

In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess government's choices. The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty. “An informed public is the most potent of all restraints upon misgovernment.”

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In the actions I have described to you today, these governments seek to “take this safeguard away from the public by placing [their] actions beyond public scrutiny.” They seek to close doors.

“Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately.... When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment “did not trust any government to separate the true from the false for us.” *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (Jackson, J., concurring)). They protected the people against secret government.”

Providing information to the taxpayers, who, after all, PAY for the gathering of this information is a core service of government – not merely an administrative after thought.

There are many items that could go on a wish list of FOIA refinements... addressing the concern of cost and long response times are very important. But it is also absolutely critical to provide mechanisms like the Open Government Commission that will help citizens ensure that their government acts fairly, lawfully, and accurately and to swiftly hold governments accountable when they improperly close doors.

Thank you for your interest... and I'll do my best to answer any questions you might have.